

Exhibit 15

OCT 02 2017

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN FRANCISCO

MARK SANDERS, an individual;
WESTPOINT HARBOR, LLC,

Plaintiffs/
Petitioners,

v.

SAN FRANCISCO BAY CONSERVATION
AND DEVELOPMENT COMMISSION,

Defendant/
Respondent.

CASE NO.:

CPF - 17 - 5 158 8 0

**VERIFIED COMPLAINT FOR
DECLARATIVE RELIEF AND PETITION
FOR WRIT OF MANDATE**

**[Cal Gov't Code §§ 6250, *et seq.*; Civ. Proc.
Code §§ 1085, *et seq.*]**

Plaintiffs/Petitioners Mark Sanders and Westpoint Harbor, LLC, bring this Verified Complaint for a declaratory judgment and Petition for a writ of mandate ordering Defendant/Respondent San Francisco Bay Conservation and Development Commission to comply with the California Constitution and the California Public Records Act (Cal. Gov't Code § 6250, *et seq.*) and the Trustworthy Electronic Document or Record Preservation Regulations (Cal. Code Regs. § 22620.1, *et seq.*). In the absence of judicial intervention, agency staff will continue to deny Plaintiffs/Petitioners and the public their fundamental rights to access to public records guaranteed by the California Constitution, statute, and regulation. While the denial of access to public records bearing on the conduct of government is concerning under any circumstances, those concerns are only heightened in this case where the staff of the government agency has pursued an abusive and vindictive course of conduct against Plaintiffs/Petitioners for well over a decade, and is well-known for its zeal and machinations in driving a program of regulatory permitting and enforcement overreach. It has been wisely observed that: "Democracy dies in the dark." This suit asks for the Court's assistance in vindicating the rights – constitutional, statutory, regulatory – quite specifically intended to ensure that light shines on the operations of government agencies and their staffs.

PARTIES

1. Plaintiff/Petitioner Mark Sanders is a natural person who serves as President of Westpoint Harbor, LLC, and is, and at all times mentioned herein was, a resident of San Mateo County, California.

2. Plaintiff/Petitioner Westpoint Harbor, LLC is, and at all times mentioned herein was, a limited liability company organized and existing pursuant to the laws of the State of California.

3. Plaintiffs/Petitioners are each members of the public within the meaning of California Government Code section 6252, subdivision (b). They have a clear, present, and substantial right to the relief sought herein and no plain, speedy, and adequate remedy at law other than that sought herein.

4. Defendant/Respondent San Francisco Bay Conservation and Development Commission (“Defendant”) is, and at all times mentioned herein was, a public agency within the

1 meaning of California Government Code section 6252, subdivision (a). Defendant maintains its
2 primary place of business in San Francisco County.

3 5. The San Francisco Bay Conservation and Development Commission is the legal
4 custodian of the records at issue in this lawsuit.

5 **JURISDICTION AND VENUE**

6 6. This Court has jurisdiction under California Government Code sections 6258 and
7 6259; California Code of Civil Procedure sections 1060 and 1085; and Article VI, section 10, of the
8 California Constitution.

9 7. Venue is proper in this court. First, the acts and omissions complained of herein
10 occurred in the County of San Francisco. Cal. Code Civ. Proc. § 393. Second, the records in
11 question are situated in this County. Cal. Gov't Code. § 6259(a). Third, Defendant resides in this
12 County. Cal. Code Civ. Proc. § 394(a).

13 **THE CALIFORNIA PUBLIC RECORDS ACT**

14 8. Under the California Public Records Act (Cal. Gov't Code § 6250, *et seq.*)
15 ("CPRA"), all records that are prepared, owned, used, or retained by any public agency, and that are
16 not subject to the CPRA's statutory exemptions to disclosure, must be made publicly available for
17 inspection and copying upon request. Cal. Gov't Code § 6253. Statutory exemptions to public
18 disclosure are narrowly construed, and the burden is on the public agency to show that any records
19 should not be disclosed. *Cnty. Youth Athletic Ctr. v. City of Nat'l City*, 220 Cal. App. 4th 1385,
20 1418 (2013).

21 9. The CPRA requires that an agency promptly provide a copy of public records to the
22 requesting person or allow inspection of the records. Cal. Gov't Code § 6253(b). The statute does
23 not allow the agency to delay or obstruct the copying of public records. *Id.* § 6253(d). An agency's
24 "inability or unwillingness to locate the records" is construed as having "the same effect as
25 withholding requested information from the public." *Cnty. Youth*, 220 Cal. App. 4th at 1425.

26 10. The CPRA further provides: "Whenever it is made to appear by verified petition to
27 the superior court of the county where the records or some part thereof are situated that certain
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1 public records are being improperly withheld from a member of the public, the court shall order the
2 officer or person charged with withholding the records to disclose the public record or show cause
3 why he or she should not do so.” Cal. Gov’t Code § 6259(a). The CPRA states that the court shall
4 decide the case after examining the record in camera (if permitted by the Evidence Code),
5 considering the papers filed by the parties, and entertaining any oral argument and additional
6 evidence as the court may allow. *Id.*

7 11. If the court finds that the failure to disclose is not justified, it shall order the agency to
8 make the record public. *Id.* § 6259(b).

9 12. The California Constitution provides an additional, independent right of access to
10 government records: “The people have the right of access to information concerning the conduct of
11 the people’s business, and, therefore, the meetings of public bodies and the writings of public
12 officials and agencies shall be open to public scrutiny.” CAL. CONST., art. I, § 3(b)(1).

13 **THE TRUSTWORTHY ELECTRONIC DOCUMENT OR RECORD**

14 **PRESERVATION REGULATIONS**

15 13. The California Legislature has recognized “the need to adopt uniform statewide
16 standards for the purpose of storing and recording permanent and nonpermanent documents in
17 electronic media.” Cal. Gov’t Code § 12168.7(a). Therefore, the Secretary of State is given the duty
18 to “approve and adopt appropriate standards established by the American National Standards
19 Institute or the Association for Information and Image Management” for this purpose. Cal. Gov’t
20 Code § 12168.7(b).

21 14. The State Records Management Act requires the head of a state agency to comply
22 with such “rules, regulations, standards, and procedures issued by the Secretary of State.” Cal.
23 Gov’t Code § 12274(d). In addition, the state agency head must “establish and maintain an active,
24 continuing program for the economical and efficient management of the records and information
25 collection practices of the agency.” Cal. Gov’t Code § 12274(a). This is to ensure “that the
26 information needed by the agency may be obtained with a minimum burden upon individuals and
27 businesses, especially small business enterprises and others required to furnish the information.” *Id.*

1 15. The Trustworthy Electronic Document or Record Preservation Regulations
2 (“Regulations”) became effective on August 8, 2012. Their purpose “is to identify the uniform
3 statewide standards adopted by the Secretary of State, in consultation with the Department of
4 General Services, for use in recording, storing, and reproducing permanent and nonpermanent
5 documents or records in electronic media.” 2 Cal. Code Regs. § 22620.1.

6 16. The Regulations expressly require that state agencies comply with the standards
7 provided in them. 2 Cal. Code Regs. § 22620.1; *see also* Cal. Gov’t Code § 12274(d).

8 17. The provisions of the Regulations apply to official documents that are electronically
9 originated, as well as electronic documents that are created or maintained as official documents. 2
10 Cal. Code Regs. § 22620.2. Official documents are “those defined as such in applicable statutes and
11 in business practices of the entity responsible for retaining said documents or records,” and in the
12 absence of applicable statutes, official records are “those defined in the entity’s business practices.”
13 2 Cal. Code Regs. § 22620.3(h).

14 18. Under California Government Code section 12168.7, subdivision (c), state agencies
15 must utilize a “trusted system” to facilitate storage of electronic documents. The California
16 Government Code specifies that a trusted system is “a combination of techniques, policies, and
17 procedures for which there is no plausible scenario in which a document retrieved from or
18 reproduced by the system could differ substantially from the document that is originally stored.” *Id.*
19 The Regulations further set out the following minimum standards required of a trusted system:

- 20 • The trusted system must utilize both hardware and media storage methodologies to
21 prevent unauthorized additions, modifications or deletions during the approved lifecycle
22 of the stored information;
- 23 • The trusted document management system must be verifiable through independent audit
24 processes ensuring that there is no plausible way for electronically stored information to
25 be modified, altered, or deleted during the approved information lifecycle; and
- 26 • The trusted document management system must write at least one copy of the electronic
27 document or record into electronic media that does not permit unauthorized additions,
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1 deletions, or changes to the original document and that is to be stored and maintained in
2 a safe and separate location.

3 2 Cal. Code Regs. §§ 22620.3(g), 22620.7 (incorporating by reference section 5.3.3 of the ‘AIIM
4 ARP1-2009 Analysis, Selection, and Implementation of Electronic Document Management
5 Systems’ (“AIIM Recommended Practice”)).

6 19. The Regulations also require the implementation of a document management policy
7 that meets certain standards: “To ensure that appropriate policies and procedures associated with the
8 creation, management, and storage of electronic documents or records are in writing, a document
9 management policy shall be prepared...in accordance with section 6.17 Business practices
10 documentation of ‘AIIM ARP1-2009 Analysis, Selection, and Implementation of Electronic
11 Document Management Systems,’ approved June 5, 2009, which is incorporated by reference in this
12 section.” 2 Cal. Code Regs. § 22620.5. The AIIM Recommended Practice provisions incorporated
13 by reference specifically list seven types of information that a document management policy must
14 include, at minimum:

- 15 • description of how information will be scanned, indexed, and verified;
- 16 • description of how the system will be secured from unauthorized access;
- 17 • description of how documents will be secured from unauthorized modification or
18 alteration;
- 19 • description of how authorized modification of documents will be managed, including
20 audit trail;
- 21 • information and the ability to retrieve any previous document version required to be
22 maintained;
- 23 • description of how notes and annotations (if any) will be stored and managed, if they are
24 a part of the business record;
- 25 • description of how these policies and procedures will be followed; and
- 26 • description of how the system will adhere to the published records retention schedule.

1 **FACTUAL ALLEGATIONS**

2 20. Plaintiffs/Petitioners Mark Sanders and Westpoint Harbor, LLC own and operate
3 Westpoint Harbor, a marina located on the San Francisco Peninsula in Redwood City.

4 21. On July 24, 2017, the Defendant/Respondent San Francisco Bay Conservation and
5 Development Commission (“BCDC”) issued a Violation Report/Complaint for the Imposition of
6 Administrative Civil Penalties (Enforcement Investigation No. ER2010.013) against
7 Plaintiffs/Petitioners Mark Sanders and Westpoint Harbor, LLC, a true and correct copy of which is
8 attached as Exhibit A (“Violation Report/Complaint”). The Violation Report/Complaint alleges
9 more than nine years of violations of BCDC Permit No. 2002.02 and the McAteer-Petris Act. The
10 Violation Report/Complaint threatens the imposition of a \$504,000 civil penalty. (*See* Exhibit A at
11 40, 50-51).

12 22. In order to prepare a Statement of Defense to the Violation Report/Complaint,
13 Plaintiffs/Petitioners Mark Sanders and Westpoint Harbor, LLC (“Plaintiffs”) are required to review
14 and respond to an extensive volume of documents and factual allegations in the Violation
15 Report/Complaint. Indeed, the text of the Violation Report/Complaint, excluding 12 pages of
16 exhibits, is 41 single-spaced pages in length and contains hundreds of alleged statements of fact.
17 (*See* Exhibit A). The Administrative Record prepared by the agency and relied on by the Violation
18 Report/Complaint contains 94 enumerated documents, many of which themselves contain additional
19 documents. *Id.* at 42-45. There are more than 865 pages within the 94 Administrative Record
20 documents identified by the agency.

21 23. In correspondence regarding Plaintiffs’ deadline to respond to the Violation
22 Report/Complaint, a true and correct copy of which is attached as Exhibit B, even BCDC’s Chief
23 Counsel, on behalf of the Executive Director, acknowledged the “detailed factual allegations in the
24 Violation Report/Complaint,” as well as the allegations of a “large number of violations, of many
25 different conditions and requirements of the BCDC permit for Westpoint Harbor.” (Exhibit B at 9).

26 24. Given the tremendous number of facts alleged by the agency, and the great volume of
27 documents the agency relies upon, it is essential for Plaintiffs to be provided with relevant records
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1 with enough time to review and utilize them in responding to the Violation Report/Complaint. The
2 deadline for Plaintiffs to submit their Statement of Defense is October 20, 2017, only three weeks
3 from the filing of this Complaint.

4 25. Plaintiffs, by and through their legal counsel, made a written request to BCDC for
5 such relevant records on August 7, 2017, pursuant to the CPRA (Cal. Gov't Code § 6250, *et seq.*). A
6 true and correct copy of the request is attached as Exhibit C ("August 7, 2017 Request"). The
7 August 7, 2017 Request asked for:

8 [A]ll "public records" (to the utmost extent of the meaning of that
9 term) that relate in any way to the alleged permit violations or
10 purported facts asserted in the Violation Report/Complaint for the
11 Imposition of Administrative Civil Penalties (Enforcement
Investigation No. ER2010.013) that the Commission mailed to Mark
Sanders and Westpoint Harbor, LLC.

12 The request also specified the inclusion of public records received, sent, created, or modified by
13 twelve BCDC staff members relevant to the claims. (*See* Exhibit C).

14 26. Plaintiffs' request reasonably described the aforementioned records.

15 27. Between August 7, 2017, and August 21, 2017, Plaintiffs and BCDC exchanged
16 email correspondence regarding the CPRA request. A true and correct copy of the complete
17 correspondence between Plaintiffs and BCDC during this time is attached as Exhibit D.

18 28. BCDC provided access to inspect and copy some materials responsive to the August
19 7, 2017 Request, while simultaneously redacting and/or withholding an unspecified number of
20 records. On August 11, 14, and 15, 2017, Plaintiffs' legal counsel traveled to BCDC's offices to
21 inspect copies of hardcopy public records that BCDC provided access to as responsive to the request.
22 Per BCDC staff's instruction to Plaintiffs' legal counsel, pages of the inspected hardcopy public
23 records were marked so that BCDC staff could identify such marked pages for copying. Those
24 copies were to be made by BCDC staff and then to be produced by BCDC to Plaintiffs. On August
25 21, 2017, BCDC stated that it had finished providing all copies of the hardcopy public records that
26 Plaintiffs' legal counsel had marked for copying. (Exhibit D at 60-61).

1 29. On August 16, 2017, BCDC provided some public records in the form of electronic
2 files and some public record emails that had been printed, then scanned, then provided in Adobe
3 Acrobat (.pdf) format. (Exhibit D at 49).

4 30. Upon review of the records disclosed by BCDC, Plaintiffs discovered that several
5 documents were not produced despite being responsive to the August 7, 2017 Request, and that
6 BCDC had wrongfully withheld at least one document based on an improper claim of privilege.

7 31. On September 7, 2017, Plaintiffs, by and through their legal counsel, sent a demand
8 letter to BCDC requesting compliance with the California Public Records Act and full disclosure of
9 documents responsive to the August 7, 2017 Request. A true and correct copy of the demand letter
10 is attached as Exhibit E (“September 7, 2017 Demand Letter”).

11 32. On September 12, 2017, BCDC sent an initial letter response to the September 7,
12 2017 Demand Letter, a true and correct copy of which is attached as Exhibit F. BCDC also sent
13 follow-up emails regarding the CPRA request, and a true and correct copy of this correspondence
14 between September 14, 2017, and September 19, 2017, is attached as Exhibit G.

15 33. Plaintiffs have continued to discover a pattern of BCDC’s incomplete disclosure and
16 deficient searching of its electronic files in response to Plaintiffs’ CPRA request. For example,
17 Plaintiffs were not initially made aware that there were electronic “staff folders” containing files
18 responsive to the CPRA request, and such “staff folders” were never produced or alluded to by
19 BCDC. The existence of such staff folders was only discovered because Plaintiffs noticed during
20 review of other documents that staff folders were referenced. (*See* Exhibit E at 4, Item 18-19).
21 When questioned about a staff folder, BCDC’s Chief Counsel responded that he had “not been
22 aware” that a referenced file was in the staff folder, and only then conducted review of that staff
23 folder. (Exhibit F at 4, Item 19; Exhibit G at 3). Similarly, certain digital photographs taken by
24 BCDC were not produced until September 14, 2017, after Plaintiffs again noticed that such photos
25 were referenced by another document. (Exhibit E at 4, Item 18; Exhibit F at 4, Item 18; Exhibit G at
26 1). Plaintiffs listed several other documents responsive to the CPRA request that were initially
27 absent as well. (*See* Exhibit E at 1-4; Exhibit B at 18).

1 34. Given that multiple electronic files had not been produced in response to the CPRA
2 request despite BCDC's claim that electronic files had been searched and provided, Plaintiffs
3 expressed concern that additional responsive electronic files have not actually been produced.
4 (Exhibit B at 17; Exhibit E at 4, Item 18).

5 35. In addition, BCDC has demonstrated a pattern of delayed responses and lack of
6 adherence to its own deadlines. Plaintiffs' September 7, 2017 Demand Letter provided a week for
7 BCDC to respond, given the impending deadline for Plaintiffs to prepare a Statement of Defense,
8 and requested an answer to the issues by September 14, 2017. (Exhibit E at 8-9). In its September
9 12, 2017 letter, BCDC stated that it would respond to remaining arguments "by this Friday or no
10 later than early next week," which was already after Plaintiffs' requested deadline. (Exhibit F at 4).
11 BCDC repeated on September 14, 2017 and September 15, 2017, that it would address the
12 arguments very soon. (Exhibit G at 1, 3).

13 36. By "early [the] next week," however, BCDC postponed its answer, indicating that it
14 would instead respond "within the next couple of days." (Exhibit B at 23; Exhibit G at 4). BCDC
15 did not do so, providing no response in the next days or throughout the remainder of that week. It
16 was not until September 28, 2017, twenty-one days after Plaintiffs sent the Demand Letter, that
17 BCDC finally provided an explanation for its claimed exemptions. A true and correct copy of
18 BCDC's final letter on September 28, 2017 is attached as Exhibit H.

19 37. In one of BCDC's most recent emails on September 18, 2017, BCDC's own
20 Executive Director acknowledged that "BCDC staff has not yet fully responded to your Public
21 Records Act request," even as he set the deadline for Plaintiff's Statement of Defense for a date only
22 one month from then. (Exhibit B at 23).

23 38. Plaintiffs have been forced to file this petition in order to compel BCDC to comply
24 with the California Public Records Act and the Trustworthy Electronic Document or Record
25 Preservation Regulations. With regards to the CPRA, BCDC has (1) wrongfully withheld at least
26 one document on the basis of privilege, and should be ordered to provide a privilege log in order to
27 show that other documents are not being wrongfully withheld or redacted; and (2) wrongfully
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1 withheld records based on improper reliance on deliberative process privilege and the preliminary
2 drafts exemption. With regards to the Regulations, BCDC has not complied in two ways: (1) BCDC
3 has failed to implement a trusted document management system to store electronic versions of
4 official documents; and (2) BCDC has failed to implement any document management policy in
5 accordance with required legal standards.

6 **The California Public Records Act**

7 **BCDC has demonstrated improper claims of privilege**

8 39. In the email sent on August 14, 2017, counsel for BCDC asserted attorney-client
9 privilege, attorney product work doctrine, deliberative process privilege, and the preliminary drafts
10 exemption as justifications for redacting and/or withholding an unspecified number of records.
11 (Exhibit D at 32).

12 40. Upon review of the records disclosed by BCDC, Plaintiffs discovered at least one
13 record was improperly redacted on the basis of attorney-client privilege. Administrative Record
14 Document (“AR Doc.”) 14, as numbered on the Index of Administrative Record, is a document that
15 discusses the public access requirements at the Westpoint Harbor site, which is at the core of many
16 of BCDC’s allegations in the Violation Report/Complaint. However, a portion of the AR Doc. 14
17 email chain was redacted and marked “attorney-client privilege.” There is no basis for this assertion
18 of privilege. Neither of the participants in the email chain, Adrienne Klein or Tom Sinclair, are
19 BCDC attorneys.

20 41. After Plaintiffs questioned this designation, BCDC stated in the September 12, 2017
21 letter that the redacted section was not privileged after all and produced the un-redacted document.
22 (Exhibit F at 2, Item 1). The un-redacted document reveals on its face that the improper privilege
23 claim was made by BCDC staff to obscure an embarrassing internal BCDC staff communication that
24 reflects improper bias on the part of BCDC staff against Plaintiffs. (Exhibit K at 1 (“Tom, West
25 Point Marina is going to be a big and juicy case for you b/c Mark Sanders, the principal, doesn’t
26 think too highly of us. This is one of your top priorities.”)). In the September 7, 2017 Demand
27 Letter and in a September 15, 2017 email, Plaintiffs cited this example of an improper privilege
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1 claim and expressed concern that other withheld documents might be likewise wrongfully withheld
2 or redacted. (Exhibit B at 17-18).

3 42. Plaintiffs are aware of another claim of attorney-client privilege that is not
4 appropriate. A scan of a “Privileged Material” sheet obtained from BCDC hardcopy records, a true
5 and correct copy of which is attached as Exhibit I, indicates that an email between Adrienne Klein
6 and Andrea Gaut, “et al.” is privileged. Unless one of the undisclosed recipients is a BCDC attorney
7 and the communication concerned the provision of legal advice, it appears this email is not actually
8 privileged.

9 43. In a September 15, 2017 email, Plaintiffs attached the “Privileged Material” sheet and
10 questioned BCDC’s designation of privilege. (Exhibit B at 17-18). Plaintiffs cited this as an
11 example of a potentially improper claim of privilege. BCDC did not respond to the issue.

12 BCDC has withheld documents based on improper reliance on exemptions

13 44. In the email sent on August 14, 2017, counsel for BCDC also asserted deliberative
14 process privilege and the preliminary drafts exemption in redacting and/or withholding an
15 unspecified number of records. (Exhibit D at 32).

16 45. In the September 7, 2017 Demand Letter, Plaintiffs informed BCDC that the
17 deliberative process privilege is derived from the public interest exemption of California
18 Government Code section 6255, subdivision (a), and therefore, the deliberative process privilege
19 only applies if BCDC can demonstrate that the public interest served by not making the records
20 public clearly outweighs the public interest served by disclosure of the records. (Exhibit E at 8).
21 Plaintiffs challenged the exemption because BCDC had stated no public interest served in
22 withholding the documents.

23 46. In the September 7, 2017 Demand Letter, Plaintiffs also informed BCDC that the
24 preliminary drafts exemption under Government Code section 6254, subdivision (a), allows
25 exemption only if three requirements are fulfilled: (1) the records be preliminary drafts, notes, or
26 interagency or intra-agency memoranda; (2) the records are not retained by the agency in the
27 ordinary course of business; and (3) the public interest in withholding the records clearly outweighs

1 the public interest in disclosure. *Citizens for A Better Env't v. Dep't of Food & Agric.*, 171 Cal. App.
2 3d 704, 711-12 (1985). (Exhibit E at 6-7). Plaintiffs challenged the exemption in part because
3 BCDC stated no public interest served in withholding the documents and did not satisfy the third
4 factor.

5 47. After weeks of promising to respond to Plaintiffs' exemption challenges and failing to
6 adhere to their own deadlines, BCDC finally responded in a letter on September 28, 2017. BCDC
7 alleged that the public interested served in withholding documents on both deliberative process
8 privilege and the preliminary drafts exemption is in allowing BCDC staff to "candidly discuss
9 alleged permit violations at Westpoint Harbor, potential corrective measures, and enforcement
10 options without being inhibited by the potential that their deliberations will be disclosed to
11 Respondents and the public." (Exhibit H at 8).

12 48. But "not every disclosure which hampers the deliberative process implicates the
13 deliberative process privilege," for deliberative process privilege only applies if the public interest in
14 nondisclosure "clearly outweighs" the public interest in disclosure. *California First Amendment*
15 *Coal. v. Superior Court*, 67 Cal. App. 4th 159, 172 (1998).

16 49. The public interest in disclosure is inherently strong. Courts have held that "the
17 CPRA provides a presumption of openness" and that public records are presumptively open because
18 they contain 'information relating to the conduct of the public's business.'" *Humane Soc'y of the*
19 *United States v. Superior Court of Yolo Cty.*, 214 Cal. App. 4th 1233, 1267 (2013). "If the records
20 sought pertain to the conduct of the people's business there is a public interest in disclosure. The
21 weight of that interest is proportionate to the gravity of the governmental tasks sought to be
22 illuminated and the directness with which the disclosure will serve to illuminate." *Id.* at 1267-68
23 (emphasis in original).

24 50. Disclosure of the records sought in this case would contribute significantly to public
25 understanding of government activities. BCDC has regional regulatory authority over development
26 of the San Francisco Bay, approves and administers permits required to develop in and around the
27 Bay, and issues complaints/violation reports threatening hundreds of thousands of dollars (and, in
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1 some instances, millions of dollars) in civil penalties. Given the scope of BCDC's regulatory control
2 and its punitive authority, there is a compelling public interest in reviewing public records to ensure
3 that control and authority are exercised properly, lawfully, and in the public interest. Disclosure of
4 the records sought will allow evaluation of the Violation Report/Complaint and its allegations for
5 those requirements, including, but surely not limited to, methodological soundness, technical
6 accuracy, and lack of bias or other improper motive or influence.

7 51. In addition, BCDC's Chief Counsel has been in communications with representatives
8 from an organization called Citizens Committee to Complete the Refuge ("CCCR") regarding
9 Westpoint Harbor and allegations asserted in the Violation Report/Complaint. (See Exhibit L).
10 BCDC has not clearly stated that all public records regarding BCDC's communications with CCCR
11 that relate to the alleged permit violations or purported facts asserted in the Violation
12 Report/Complaint have been disclosed in response to the August 7, 2017 Request. Upon
13 information and belief, BCDC has not disclosed all such communications. BCDC staff collusion
14 with outside groups such as CCCR in connection with asserting allegations made in the Violation
15 Report/Complaint would, in and of itself, constitute bad faith conduct. Such bad faith conduct
16 would only be compounded if the public records reflecting it have not been disclosed in response to
17 the August 7, 2017 Request. In considering whether deliberative process applies, a California court
18 has noted that if an agency "acted intemperately or in bad faith, no public policy supports an attempt
19 to conceal such actions." *Cty. of Riverside v. Superior Court (Madrigal)*, 86 Cal. App. 4th 211
20 (2000), *rev'd on other grounds*, 27 Cal. 4th 793 (2002).

21 52. Statutory exemptions to public disclosure are narrowly construed, and the burden is
22 on the public agency to show that any records should not be disclosed. *Cnty. Youth Athletic Ctr. v.*
23 *City of Nat'l City*, 220 Cal. App. 4th 1385, 1418 (2013). BCDC has not met the burden of
24 establishing that the public interest in withholding records "clearly outweighs" the public interest in
25 disclosing them.

1 BCDC has not made a reasonable effort to search for the requested records

2 53. California law requires that BCDC make a reasonable effort to search its records to
3 identify those public records that are responsive to Plaintiffs' CPRA request. *See, e.g., State Bd. of*
4 *Equalization v. Superior Court*, 10 Cal. App. 4th 1177, 1186 (1992).

5 54. As described above, Plaintiffs discovered that BCDC staff maintain electronic "staff
6 folders," and that at least some of such staff folders contain records responsive to Plaintiffs' CPRA
7 request, but that those records were not initially produced to Plaintiffs. Only after Plaintiffs sent the
8 September 7, 2017 Demand Letter did BCDC's Chief Counsel respond that he had "not been aware"
9 that a referenced file was in the staff folder, and only then conducted review of that staff folder.
10 (Exhibit F at 4, Item 19; Exhibit G at 3).

11 55. In further response to Plaintiffs' September 7, 2017 Demand Letter, BCDC's Chief
12 Counsel stated that BCDC was providing "electronic copies of documents in Adrienne Klein's and
13 Andrea Gaffney's individual staff folders. As you will see, Adrienne has a subfolder named
14 'WestPoint Harbor Ellen Letters,' and Andrea has a subfolder named 'From Ellen,' both referring to
15 former BCDC Bay Design Analyst Ellen Miramontes." (Exhibit G at 1).

16 56. BCDC's Chief Counsel also stated, "I have confirmed that none of the following
17 BCDC staff members have folders or subfolders in their individual staff folders for Westpoint
18 Harbor: Brad McCrae, John Bowers, Matthew Trujillo, and Erik Buehamann [*sic*]; not do I." *Id.*

19 57. Plaintiffs' CPRA request (the August 7, 2017 Request) requested "all 'public records'
20 (to the utmost extent of the meaning of that term) that relate in any way to the alleged permit
21 violations or purported facts asserted in the Violation Report/Complaint[.]" and specifically noted
22 that the request "includes, but is not limited to, public records received, sent, created, or modified by
23 the following individuals:

- 24 • Robert (Bob) Batha
- 25 • Andrea (Ande) Bennett
- 26 • John Bowers
- 27 • Erik Buehamann

- Andrea Gaut
- Adrienne Klein
- Steve McAdam
- Brad McCrea
- Ellen Miramontes
- Tom Sinclair
- Matthew Trujillo
- Marc Zeppetello”

(Exhibit C at 1).

58. Upon information and belief, current and former BCDC staff, in addition to those identified in paragraphs 55 and 56, above, maintain or maintained individual electronic “staff folders.”

59. Upon information and belief, BCDC has not searched all individual staff folders where records responsive to the August 7, 2017 Request are likely located, including the individual staff folders currently or previously used by Robert (Bob) Batha, Andrea (Ande) Bennett, Andrea Gaut, Steve McAdam, Tom Sinclair, Jeff Churchill, Leslie Lacko, and Gregory Ogata.

60. Upon information and belief, BCDC has not searched all electronic email records where records responsive to the August 7, 2017 Request are likely located. Upon information and belief, BCDC has not searched electronic email records maintained by former BCDC staff, including Robert (Bob) Batha, Andrea (Ande) Bennett, Andrea Gaut, Steve McAdam, Tom Sinclair, Jeff Churchill, and Leslie Lacko.

Trustworthy Electronic Document or Record Preservation Regulations

Email records responsive to the August 7, 2017 Request are official documents

61. The provisions of the Regulations apply to “official documents,” which are “those defined as such in applicable statutes and in business practices of the entity responsible for retaining said documents or records,” and in the absence of applicable statutes, official records are “those defined in the entity’s business practices.” 2 Cal. Code Regs. § 22620.3(h).

1 62. BCDC's business practices are established in its Records Retention Schedule, as
2 approved by the Secretary of State on March 15, 2017. Attached as Exhibit J is a true and correct
3 copy of BCDC's Records Retention Schedule. Under the State Records Management Act, an
4 agency's record retention schedule, once approved, becomes the legal authority for the agency to
5 dispose of public records. In a September 28, 2017 letter, BCDC confirmed that its Records
6 Retention Schedule establishes its "normal course of business." (Exhibit H at 5-6).

7 63. According to BCDC's Record Retention Schedule, emails that are "classified as
8 official records" are those that are not "transitory" emails, where transitory emails are defined as
9 messages "created primarily for the communication of informal information as opposed to the
10 perpetuation or formalization of knowledge." (Exhibit J at 2). The Record Retention Schedule
11 provides that transitory emails are destroyed when they have served their purpose, unlike emails that
12 are official records. *Id.* The email records withheld by BCDC are official records rather than
13 transitory, because they communicated formal knowledge about Plaintiffs' alleged permit violations.

14 64. Furthermore, the email records responsive to the August 7, 2017 Request clearly fall
15 under the Records Retention Schedule's category of official records related to "Major Permits,"
16 which includes but is not limited to: "permit application, summary and exhibits, staff
17 recommendations, plan review, permit assignments, general correspondence, and recorded
18 documents." *Id.* at 28 (emphasis added). The email records encompassed by Plaintiffs' August 7,
19 2017 Request are "general correspondence" related to a major permit and, therefore, are official
20 documents as defined by the Records Retention Schedule and BCDC's business practices.

21 65. In determining the retention practices for an official email record, the Records
22 Retention Schedule states that an official email record is governed by the nature of that email's
23 contents: "E-mail records that are classified as official records are subject to the individual
24 department's records retention schedules...that most closely matches the subject matter of the e-
25 message." *Id.* at 2. The Record Retention Schedule provides that official records related to major
26 permits be retained for ten years after the permit is no longer active. *Id.* The substantial duration of
27 required retention of these email records is a strong indication of their importance.

1 BCDC has not stored official documents in a trusted system

2 66. In connection with communications with BCDC regarding the CPRA request,
3 Plaintiffs discovered that BCDC does not store “electronic versions of official documents or
4 records” in a trusted system as required by the California Government Code and defined by the
5 Regulations. Cal. Gov’t Code § 12168.7(c); 2 Cal. Code Regs. § 22620.3(g), 22620.7. Among other
6 requirements, a trusted system includes “writing at least one copy of the electronic document or
7 record into electronic media that does not permit unauthorized additions, deletions, or changes to the
8 original document and that is to be stored and maintained in a safe and separate location.” 2 Cal.
9 Code Regs. § 22620.3(g), 22620.7 (incorporating by reference section 5.3.3 of the AIIM
10 Recommended Practice).

11 67. BCDC demonstrates troubling practices—or lacks practices entirely—concerning the
12 storage of official email records. In the email sent on August 14, 2017, BCDC informed Plaintiffs
13 that BCDC did not have a “central electronic file for emails related to [Westpoint Harbor],” aside
14 from “a few scattered emails in the electronic permitting and enforcement files.” (Exhibit D at 32).

15 68. BCDC’s practice for “email communications that are deemed to transmit substantive
16 information” was not to create electronic copies of the documents as required by the Regulations, but
17 to print out a “hard-copy file” of the document. *Id.*

18 69. Upon information and belief, some substantive emails were apparently not even
19 converted into hardcopy versions and were not copied or transferred from individual staff computers.
20 Plaintiffs discovered this when BCDC complained about the “burdensome” process of having each
21 BCDC staff member “locate individual emails on their individual computers.” *Id.* at 33.

22 70. In an email sent on September 15, 2017, BCDC provided only files from two
23 electronic staff folders. (Exhibit G at 3). Even the two staff folders from which records were
24 provided were evidently not resources that BCDC’s Chief Counsel was familiar with, as he stated
25 that he had “not been aware” that a referenced file was in the staff folder, and only conducted review
26 of staff folders after Plaintiffs raised the issue with him. (Exhibit F at 4, Item 19; Exhibit G at 3).

1 71. Upon information and belief, BCDC lost or did not locate official electronic records,
2 and produced documents were not kept secure from modification, due to lack of storage in a trusted
3 system.

4 BCDC does not have a document management policy for official documents

5 72. In connection with communications with BCDC regarding the CPRA request,
6 Plaintiffs also discovered that BCDC has not been following an adequate document management
7 policy for the “creation, management, and storage of electronic documents or records,” such as the
8 aforementioned official emails records. 2 Cal. Code Regs. § 22620.5.

9 73. Upon information and belief, BCDC has not developed any document management
10 policy at all for the management and storage of official email records. In the email sent on August
11 14, 2017, BCDC informed Plaintiffs that “other than emails printed for the hard-copy files, emails
12 are managed by individual staff on their individual work computers and are deleted or retained in the
13 discretion of each staff-person or in accordance with their individual practices.” (Exhibit D at 32-
14 33). Upon information and belief, BCDC staff members choose whether to delete or retain
15 potentially substantive email records based on individual preference instead of following any kind of
16 systematic policy for the “management and storage of electronic documents,” as required by the
17 Regulations.

18 74. BCDC has made reference to its Records Retention Schedule as providing that
19 “transitory emails”—which are emails that are created primarily for the communication of informal
20 information as opposed to the perpetuation or formalization of knowledge—can be destroyed when
21 they have served their purpose. (Exhibit D at 32). However, the fact that the Records Retention
22 Schedule approves the destruction of transitory emails does not mean that the Schedule allows the
23 identification of official records and destruction of transitory emails to proceed without any type of
24 standardized procedure. The California State Records and Information Management Program
25 (“CalRIM”), the state records program within the State Archives that approves records retention
26 schedules including the one that regulates BCDC, has stated with regard to email records:

1 The content of email messages may vary considerably and, therefore,
2 must be evaluated on a case-by-case basis to determine the length of
3 time the message must be retained. Email that provides insight into the
4 organization and functions of an agency and contains content with
5 historical value must be “filed,” just as you would a paper record, in an
6 e-folder with similar business or program items. Record emails may be
7 flagged for transfer to the State Archives at the end of their retention
8 period. An agency must have an email management policy in place to
9 ensure record emails are not deleted alongside transitory emails. A
10 policy should outline a routine for ensuring record emails are properly
11 identified and saved.....

12 An agency’s email policy should be developed to enhance
13 management of record emails. An effective policy includes direction
14 on topics such as email filing methods, email subject lines, and storage
15 and retention of email, thereby increasing the accessibility of records.
16 Policies should include whether the sender or the receiver should save
17 email records, how to determine if an email is a record, and how to
18 segregate record email into the appropriate series and record storage.
19 Non-record and duplicate emails should be deleted from mailboxes
20 regularly. If an agency receives a request for an email record for a
21 litigation issue, for example, a well-planned email policy can help
22 ensure that the record is discoverable during its retention period or
23 show that its deletion was properly carried out according to retention
24 policy.

25 California Records and Information Management Program (CalRIM), *Practical Guidebook for*
26 *Managing Electronic Records* (2015) (emphasis added).

27 75. Not only does BCDC neglect to follow the best practices described by CalRIM, but
28 BCDC has not pointed to any information (let alone a credible guide) provided to its staff members
that discusses procedures for identifying and preserving official email records, nor has BCDC
alluded to a single training session provided to its staff members regarding the same.

76. In an email sent on August 18, 2017, Plaintiffs expressed concern for BCDC’s lack of
“an email management policy in place to ensure record emails are not deleted alongside transitory
emails.” (Exhibit B at 3). Plaintiffs also quoted direction provided by the CalRIM, stating: “A
policy should outline a routine for ensuring record emails are properly identified and saved.” *Id.*
BCDC did not provide a response to Plaintiffs regarding these issues.

77. Upon information and belief, the fact that official email records are haphazardly
stored is further evidence of BCDC’s lack of a document management policy. As discussed, some
email records are “scattered” in various electronic files, others are printed out as hardcopy versions,

1 and still others are apparently never transferred from individual staff computers. (Exhibit D at 32-
2 33).

3 78. As a result of BCDC's noncompliance with the Regulations, BCDC has demonstrated
4 difficulty in locating at least one document that even it knew was in its custody. In the September 7,
5 2017 Demand Letter, Plaintiffs identified a specific email from a BCDC staff member that had not
6 been produced despite being responsive to the CPRA request. (Exhibit E at 4, Item 17). BCDC
7 stated in its September 12 letter that it was "unable to locate" this email, but later produced it.
8 (Exhibit F at 4, Item 17; Exhibit G at 1). This calls into question whether BCDC lost or did not
9 locate other substantive documents, and whether produced documents were kept secure from
10 modification, given the absence of a document management policy.

11 79. Similarly, BCDC has demonstrated difficulty in locating files in electronic "staff
12 folders." When Plaintiffs noticed that a BCDC email referenced a file in one such staff folder,
13 BCDC's Chief Counsel stated that he had "not been aware" of the referenced file. (Exhibit F at 4,
14 Item 19). This likewise calls into question whether BCDC lost or did not locate other substantive
15 documents and whether produced documents were kept secure from modification, in the absence of
16 a document management policy.

17 **FIRST CAUSE OF ACTION**

18 **Violation of the California Public Records Act and the California Constitution**

19 **Writ of Mandate**

20 80. Plaintiffs incorporate herein by reference the allegations of paragraphs 1 through 79
21 above, inclusive, as if set forth in full.

22 81. It was, and is, Defendant's duty to disclose public records under the California
23 Constitution, Article I, section 3, and the California Public Records Act (Cal. Gov't Code § 6250, *et*
24 *seq.*).

25 82. The documents sought by Plaintiffs in the August 7, 2017 Request are "public
26 records" as defined by California Government Code section 6252, subdivision (e), because they
27 were prepared, owned, used, and/or retained by Defendant and its agents and employees, and they
28

1 relate to the conduct of the public's business. Defendant has never contended that the documents
2 sought by Plaintiffs are not "public records."

3 83. Defendant's claims of exemption based on attorney-client privilege has been
4 improperly applied before to at least one withheld record. AR Doc. 14 was redacted and marked
5 "attorney-client privilege," but as Defendant admitted, there was no basis for this assertion of
6 privilege. Neither of the participants in the email chain, Adrienne Klein or Tom Sinclair, are (or
7 were) BCDC attorneys. Similarly, a "Privileged Material" sheet obtained from Defendant indicates
8 that an email between Adrienne Klein and Andrea Gaut, "et al." is likely not privileged; nor is either
9 of them a BCDC attorney. (Exhibit I).

10 84. Defendant's claim of exemption for deliberative process privilege and the preliminary
11 drafts exemption does not apply because Defendant has not met its burden that the alleged public
12 interest served by not making the records public "clearly outweighs" the public interest served by
13 disclosure of the records. Cal. Gov't Code § 6255(a); *Times Mirror Co. v. Superior Court*, 53 Cal.
14 3d 1325, 1338 (1991).

15 85. Defendant's claims of exemptions are further questionable given BCDC's lack of
16 document retention standards and failure to properly preserve email records in electronic form.

17 86. Defendant may be improperly withholding other documents based on attorney-client
18 privilege, attorney work product doctrine, deliberative process privilege, and the preliminary drafts
19 exemption, which Plaintiffs are unable to ascertain without Defendant providing a privilege log.

20 87. Plaintiffs have informed Defendant of each of these issues in the September 7, 2017
21 Demand Letter and in a September 15, 2017 email. Defendant has demonstrated a pattern of delayed
22 responses to issues presented by Plaintiffs, despite simultaneously setting a short deadline for
23 Plaintiffs to submit a Statement of Defense. Even when Defendant did respond, it failed to provide
24 an explanation for the "Privileged Material" sheet despite Plaintiffs raising the issue. By the acts set
25 forth, Plaintiffs have exhausted administrative remedies.

26 88. Plaintiffs are and were at all times ready to tender any required fees for the
27 identifiable public records requested.
28

1 89. In a September 28, 2017 letter, Defendant rejected Plaintiffs’ request for a privilege
2 log. (Exhibit H at 2). The Supreme Court case that Defendant cited to, however, indicated that a
3 public agency has no obligation to create a privilege log “at the pre-petition stage.” *Haynie v.*
4 *Superior Court*, 26 Cal. 4th 1061, 1074 (2001) (emphasis added). The Court went on to
5 acknowledge that a superior court could issue an “order directing the preparation of a list after a
6 petition had been filed.” *Id.* In *State Bd. of Equalization*, the example cited by the Supreme Court,
7 the Court held that “the Public Records Act does not...prohibit a court from ordering the preparation
8 of a list of the documents which are sought” and that “providing such a list is consistent with the
9 language and spirit of the Public Records Act.” *State Bd. of Equalization v. Superior Court*, 10 Cal.
10 App. 4th 1177, 1193 (1992) (finding that “the preparation of the required index of 2100 documents
11 is a one-time affair and does not involve an unreasonable amount of effort”). *See also League of*
12 *California Cities v. Superior Court*, 241 Cal. App. 4th 976, 982 (2015) (noting that the trial court
13 had ordered the agency to produce “a privilege log identifying the documents not produced, along
14 with the legal objection for not producing the documents”).

15 90. Plaintiffs and the general public will be harmed by Defendant’s nondisclosure of an
16 unspecified number of public records if they are not actually exempt under the CPRA. Defendant
17 may be improperly withholding or redacting key documents relevant to the Violation
18 Report/Complaint. Defendant would thus deprive Plaintiffs of the ability to fully defend against the
19 allegations asserted in the Violation Report/Complaint and the possible imposition of a \$504,000
20 civil penalty. The implications for Plaintiffs’ Due Process rights are obvious. In addition, the
21 general public has a right to information concerning the enforcement of alleged violations of BCDC
22 permits and the McAteer-Petris Act. Indeed, the public’s right to and interest in receiving this
23 information is made all the more compelling by the staff’s history of extreme overreaching in permit
24 administration and enforcement.

25 91. Without a privilege log identifying the currently unknown number of records
26 withheld or redacted, Defendant cannot show whether its exemptions claims are proper and whether
27 Defendant has complied with the California Constitution, Article I, section 3, and the California
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1 Public Records Act (Cal. Gov't Code § 6250, *et seq.*). Defendant's continued improper reliance on
2 deliberative process privilege and the preliminary drafts exemption also violates the California
3 Constitution, Article I, section 3, and the California Public Records Act (Cal. Gov't Code § 6250, *et*
4 *seq.*).

5 92. Upon information and belief, Defendant has not disclosed all communications with
6 CCCR that relate to the alleged permit violations or purported facts asserted in the Violation
7 Report/Complaint.

8 93. Upon information and belief, Defendant has not searched all individual staff folders
9 where records responsive to the August 7, 2017 Request are likely located, and Defendant has not
10 searched all electronic email records where records responsive to the August 7, 2017 Request are
11 likely located.

12 94. Plaintiffs and the general public will be harmed by Defendant's nondisclosure of
13 responsive public records.

14 95. Under the CPRA, Plaintiffs are entitled to institute proceedings for a writ of mandate
15 to enforce their right and the public's right to obtain the public records requested. Cal. Gov't Code
16 §§ 6258 and 6259. Further, California Government Code section 6258 requires such writ
17 proceedings to be resolved on an expedited basis "with the object of securing a decision as to these
18 matters at the earliest possible time."

19 Declaratory Relief

20 96. Plaintiffs incorporate herein by reference the allegations of paragraphs 1 through 95
21 above, inclusive, as if set forth in full.

22 97. An actual controversy exists between Plaintiffs and Defendant in that Plaintiffs
23 contend that the public records requested on August 7, 2017 are required to be disclosed and made
24 promptly available to Plaintiffs. Defendant has withheld an unspecified number of documents
25 without providing a privilege log showing that the claimed exemptions apply, Plaintiffs believe that
26 there are records that have been wrongfully withheld, and Plaintiffs believe that a reasonable search
27 of locations where responsive public records are likely located has not been conducted. Defendant
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1 has also withheld documents based on improper reliance on deliberative process privilege and the
2 preliminary drafts exemption. Accordingly, Plaintiffs and the public have been, and will continue to
3 be, unable to obtain access to the public records sought due to Defendant's unlawful acts. Pursuant
4 to California Government Code section 6258, Plaintiffs are entitled to a declaration that any and all
5 documents that the Court determines to be wrongfully withheld are public records within the
6 meaning of the Public Records Act and must be disclosed. Plaintiff are also entitled to a declaration
7 that Defendant must disclose all communications with CCCR that relate to the alleged permit
8 violations or purported facts asserted in the Violation Report/Complaint. Plaintiffs are also entitled
9 to a declaration that Defendant must conduct a reasonable search of all locations where responsive
10 public records are likely located.

11 98. A judicial determination is appropriate at this time and under these circumstances so
12 that Plaintiffs may ascertain and preserve their rights.

13 **SECOND CAUSE OF ACTION**

14 Violation of the Trustworthy Electronic Document or Record Preservation Regulations

15 Writ of Mandate

16 99. Plaintiffs incorporate herein by reference the allegations of paragraphs 1 through 98
17 above, inclusive, as if set forth in full.

18 100. A writ of mandate may be issued by this court to compel an agency to perform its
19 duty, where the agency has failed to act as required by law. Cal. Code Civ. Proc. § 1085; *California*
20 *Ass'n for Health Servs. at Home v. Dep't of Health Servs.*, 148 Cal. App. 4th 696, 705 (2007). The
21 fact that a law such as the Trustworthy Electronic Document or Record Preservation Regulations
22 does not create an explicit private right of action does not mean it cannot be the basis of a petition
23 for writ of mandate to compel compliance. *See Doe v. Albany Unified Sch. Dist.*, 190 Cal. App. 4th
24 668, 682 (2010) (citing *California Ass'n*, 148 Cal. App. 4th at 705). "In California, a party who may
25 not have standing to enforce [a particular law] may still be entitled to enforce [it] by means of a writ
26 of mandate under Code of Civil Procedure section 1085 if he is a beneficially interested party under
27 Code of Civil Procedure section 1086." *Id.* (quoting *Mission Hosp. Reg'l Med. Ctr. v. Shewry*, 168

1 Cal. App. 4th 460, 479 (2008)); *see also Common Cause v. Bd. of Supervisors*, 49 Cal. 3d 432, 440
2 (1989).

3 101. Defendant had, and still has, a ministerial duty as a state agency to comply with the
4 standards established by Trustworthy Electronic Document or Record Preservation Regulations as
5 set by the Secretary of State. 2 Cal. Code Regs. § 22620.1; Cal. Gov't Code § 12274(d).

6 102. Plaintiffs have a beneficial interest in that they are procuring enforcement of a public
7 right, requiring that Defendant complies with the Trustworthy Electronic Document or Record
8 Preservation Regulations, so that records relevant to alleged violations presently and in the future are
9 preserved and not lost or modified due to improper records retention practices. *See Citizens Assn.*
10 *for Sensible Dev. of Bishop Area v. Cty. of Inyo*, 172 Cal. App. 3d 151, 158 (1985). The public has a
11 right to access the public records of an agency as well as a right to the proper retention of such
12 records. There is a public interest in ensuring that “no governmental body impairs or defeats the
13 purpose of legislation establishing a public right,” such as the right to access public records. *Doe v.*
14 *Albany Unified Sch. Dist.*, 190 Cal. App. 4th 668, 685 (2010). Indeed, the public interest is
15 compelling and the public benefit great in securing an order requiring BCDC to comply with the
16 Trustworthy Electronic Document or Record Preservation Regulations, not simply as reflected by
17 the regulation itself and the California Public Records Act, but also by the public right to access to
18 public records enshrined in the California Constitution.

19 103. Defendant has violated California Government Code section 12168.7(c) and the
20 Regulations by failing to store email records in a “trusted system,” despite such email records being
21 defined as “official documents” under BCDC’s business practices. The Regulations require specific
22 standards of a trusted system for the storage of official documents, which includes but is not limited
23 to “writ[ing] at least one copy of the electronic document or record into electronic media that does
24 not permit unauthorized additions, deletions, or changes to the original document and that is to be
25 stored and maintained in a safe and separate location.” 2 Cal. Code Regs. §§ 22620.3(g), 22620.7
26 (incorporating by reference section 5.3.3 of the AIIM Recommended Practice). Defendant does not
27 have a central electronic file for official email records. (Exhibit D at 32). Of the email records that
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1 Defendant considered to contain information relevant to the Violation Report/Complaint and were
2 therefore official records as opposed to transitory, some email records were printed out whereas
3 others were never transferred from individual staff computers. *Id.* BCDC has clearly not maintained
4 electronic copies of these official email records in a “safe and separate location.”

5 104. Defendant has violated the Regulations by failing to implement an appropriate
6 document management policy for email records, despite such email records being defined as
7 “official documents” under BCDC’s business practices. The Regulations require a policy to meet
8 certain standards, which includes but is not limited to setting out “how information will be scanned,
9 indexed, and verified” as well as “how documents will be secured from unauthorized modification or
10 alternation.” 2 Cal. Code Regs. § 22620.5. Defendant does not appear to have a document
11 management policy at all for email records, much less a document management policy that meets
12 these standards. Instead, Defendant apparently allows each staff member to choose whether to
13 delete or retain email records based on “individual practices,” without providing staff members any
14 training or reference materials to make those determinations. (Exhibit D at 32-33).

15 105. Defendant has demonstrated difficulty in locating at least one electronic document.
16 The fact that Defendant was not able to locate other electronic documents or prevent unauthorized
17 modification of produced documents is a direct result of its failure to comply with the Regulations.

18 106. By failing to store electronic documents in a trusted electronic location, and by failing
19 to implement an appropriate document management policy, or indeed any policy at all, Defendant
20 has violated the Trustworthy Electronic Document or Record Preservation Regulations, sections
21 22620.5 and 22620.7, as well as California Government Code section 12168.7, subdivision (c).

22 **PRAYER FOR RELIEF**

23 WHEREFORE, Plaintiffs/Petitioners prays for judgment as follows:

24 1. That the Court order Defendant/Respondent Bay Conservation and Development
25 Commission to provide Plaintiffs/Petitioners Mark Sanders and Westpoint Harbor, LLC with a list of
26 any and all responsive public records that it has not released to Plaintiffs, with an explanation of why
27 each such record is not subject to release;

1 2. That the Court issue a writ of mandate directing Defendant to comply fully and
2 without further delay with the California Public Records Act and to furnish Plaintiffs with any and
3 all public records responsive to the August 7, 2017 Request, except those records it has already
4 provided to Plaintiffs and those that the Court determines may be lawfully withheld, or in the
5 alternative, to show cause why this should not be done and to issue a peremptory writ to disclose
6 such records thereafter;

7 3. For a declaration that the aforementioned records are subject to disclosure under
8 California Government Code sections 6250, *et seq.*;

9 4. That the Court issue a writ of mandate directing Defendant to comply fully and
10 without further delay with the Trustworthy Electronic Document or Record Preservation
11 Regulations, including storing official electronic documents in a trusted system and implementing a
12 document management policy that properly secures electronic documents;

13 5. That Plaintiffs be awarded attorneys' fees and costs as provided in California
14 Government Code section 6259, subdivision (d), California Code of Civil Procedure section 1021.5,
15 and any other applicable section or provision of law; and;

16 6. For such other and further relief as the Court deems proper and just.
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1 Dated: October 2, 2017

Respectfully submitted,

2 BAKER BOTTS L.L.P.

3 By: /s/ Christopher J. Carr

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15 Attorneys for Plaintiffs/Petitioners

16 Mark Sanders and Westpoint Harbor, LLC

1 **VERIFICATION**

2 I, Christopher J. Carr, am an attorney for Plaintiff/Petitioners Mark Sanders and Westpoint
3 Harbor, LLC ("Plaintiffs/Petitioners"), and have been for all times relevant in this matter. I have
4 read this Verified Complaint for Declarative Relief and Petition for Writ of Mandate and I have
5 superior knowledge than Plaintiffs/Petitioners of the facts therein. The matters stated in the
6 foregoing document are true to my knowledge except as to those matters which are stated on
7 information and belief, and as to those matters I believe them to be true.

8 I declare under penalty of perjury under the laws of the State of California that the foregoing
9 is true and correct.

10
11
12 Dated: October 2, 2017

Respectfully submitted,

13
14 By: 

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